

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

RAYMOND ALVES, et al., : Civil No.  
Plaintiffs, : 01-cv-789-DMC-MF  
v. :  
GAIL FERGUSON, et al., : TRANSCRIPT OF  
Defendants. : FAIRNESS HEARING  
-----x

Newark, New Jersey  
November 13, 2012

BEFORE:

THE HON. DENNIS M. CAVANAUGH, U.S.D.J.  
THE HON. MARK FALK, U.S.M.J.

Reported by:  
CHARLES P. McGUIRE, C.C.R.  
Official Court Reporter

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an accurate record as taken stenographically in  
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s/CHARLES P. McGUIRE, C.C.R.

CHARLES P. McGUIRE, C.C.R.

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1 JUDGE CAVANAUGH: All right. Are we ready on the  
2 Alves case?

3 Good morning.

4 All right. This is the matter of Alves v.  
5 Ferguson, Civil Action Number 01- -- must be the oldest case  
6 I have -- 789, and we're here today to conduct a fairness  
7 hearing on the proposed settlement.

8 Counsel, can we get your appearances, please?

9 MR. MARX: Good morning, Your Honor.

10 Ian Marx from Greenberg Traurig. We represent a  
11 number of the Plaintiffs in this case who were referred to  
12 in the pleadings as the Bagarozy Plaintiffs, and with me is  
13 my colleague and friend, Jason Kislin, who's been working  
14 for the past several months in connection with the fairness  
15 hearing aspect of the case, and Mr. Kislin will be  
16 presenting the primary argument on our behalf.

17 JUDGE CAVANAUGH: Fine.

18 MS. MOSES: Good morning, Your Honor.

19 Barbara Moses, Seton Hall Law School Center For  
20 Social Justice, on behalf of the Plaintiffs and the class.

21 With me this morning are three third-year students  
22 from Seton Hall Law School who with the Court's permission  
23 will present portions of the argument pursuant to Local Rule  
24 101.(1)(h). To my right is Lisa Savadjian, Rose Harper, and  
25 Kyle Bruno.

1 JUDGE CAVANAUGH: Okay.

2 MR. MANES: Your Honor, I'm Jonathan Manes from  
3 Gibbons PC, co-counsel.

4 MR. DaCOSTA: David L. DeCosta, Deputy Attorney  
5 General, representing the Defendants in this matter.

6 JUDGE CAVANAUGH: Okay. Be seated.

7 MR. DaCOSTA: Thank you.

8 JUDGE CAVANAUGH: As you can see, I've asked my  
9 colleague, Judge Falk, to be with me today, for a very good  
10 reason: He has spent an inordinate amount of his judicial  
11 career on this case. As I mentioned before, this is an '01  
12 case, it's been around a long, long time, and I've had the  
13 benefit of working with Judge Falk for these many years on  
14 this and many other cases, and he has really taken the  
15 laboring oar from the judicial side in resolving disputes  
16 over the years, doing what he could to try to bring this to  
17 a resolution with the assistance and the help of the  
18 attorneys involved in the case, and I just thought it was  
19 absolutely appropriate that he be here to assist in any way  
20 necessary. He has a firsthand knowledge of many of the  
21 things that occurred, some of which occurred before him,  
22 were reported to me, but I was not there personally. He and  
23 I, as is our custom, stayed in constant contact and we  
24 discussed this matter on numerous occasions over the years.  
25 So I am very, very satisfied that he is here and I have the

1 benefit of his view, and as well you should be. So that's  
2 why I have Judge Falk with me.

3 This is a consolidated class action brought by  
4 involuntarily committed sex offenders challenging the  
5 adequacy of mental health treatment offered at New Jersey  
6 Special Treatment Unit located in Avenel, New Jersey.

7 This fairness hearing is to consider the approval  
8 of the class-wide settlement reached between the Plaintiffs  
9 through pro bono counsel Seton Hall Law School Center For  
10 Social Justice and the Gibbons firm and the Defendants.

11 Just so that the record is clear, the Plaintiffs  
12 are convicted sex offenders who have completed prison  
13 sentences but remain involuntarily confined pursuant to the  
14 New Jersey Sexually Violent Predator Act, 30:4-27.24,  
15 et seq. This Act authorizes the indefinite civil commitment  
16 of any individual determined to be a "sexually violent  
17 predator." A sexually violent predator is defined as a  
18 person who has been convicted of or in some cases charged  
19 with but not convicted of at least one sexually violent  
20 offense and who suffers from "a mental abnormality or  
21 personality disorder that makes the person likely to engage  
22 in acts of sexual violence if not confined to a secure  
23 facility for control, care, and treatment." That's the  
24 facility in Avenel, New Jersey.

25 Once committed to the facility, the STU facility,

1 the sexually violent predator remains there until such time  
2 as a State Court finds that he "will not be likely to engage  
3 in acts of sexual violence," in which case he may be  
4 "conditionally discharged." In order to be "conditionally  
5 discharged," the individual must establish that he's been  
6 successfully treated for the mental abnormality or  
7 personality disorder that was the basis for his confinement  
8 to the STU. In order for residents to have a meaningful  
9 opportunity to work toward a potential release, the Act  
10 provides that class members receive mental health treatment.  
11 At the STU, the mental health treatment offered is primarily  
12 in the form of group therapy and individual  
13 resident-specific psycho-educational "modules" devoted to  
14 topics such as victim empathy, relapse prevention, and  
15 arousal reconditioning. The New Jersey Department of Human  
16 Services is responsible for providing mental health  
17 treatment to the residents of the STU.

18 In this consolidated action, the Plaintiffs seek  
19 declaratory and injunctive relief against various officials  
20 of the STU responsible for providing them with treatment and  
21 against the New Jersey Attorney General, who is responsible  
22 for enforcing the Act. Plaintiffs claim that the various  
23 Defendants have failed to provide the minimally adequate  
24 mental health treatment required by Federal and state law.

25 On February 15th, 2001, the original complaint in

1 the Alves case was submitted pro se by Plaintiff Raymond  
2 Alves. On March 9th, 2001, this Court granted Alves in  
3 forma pauperis status, directing that his Complaint be  
4 filed, and appointed pro bono counsel. On July 30th, 2002,  
5 after much difficulty in finding the appropriate pro bono  
6 counsel, this Court was fortunate to have the Seton Hall  
7 University School of Law Center For Social Justice enter on  
8 behalf of Mr. Alves as pro bono counsel.

9 Since then, the Center has been joined by the  
10 Gibbons firm as pro se counsel for the Plaintiffs.

11 Following lengthy pre-answer dispositive motion  
12 practice, the parties engaged in discovery, including  
13 written discovery and depositions. During this time frame,  
14 approximately 30 additional cases filed by pro se residents  
15 were consolidated into this case. These consolidations  
16 included the case captioned Bagarozzy v. Harris, which was  
17 brought by a group of STU residents led by  
18 Richard Bargarozzy, Plaintiff. Prior to consolidation,  
19 Judge Hochberg entered an order granting that group of  
20 Plaintiffs' request for pro bono counsel, and eventually the  
21 law firm of Greenberg Traurig entered an appearance on their  
22 behalf.

23 In or about 2005, the parties made efforts to  
24 concentrate on settlement negotiations with the goal of  
25 resolving all the cases on behalf of the residents of STU on

1 a class-wide basis. This is where Judge Falk became  
2 involved in these intensive negotiations and sometimes  
3 contentious negotiations, and many, many settlement  
4 conferences were had with his assistance.

5 In 2008, after the parties reached an apparent  
6 impasse, Judge Falk and I approved the appointment of a  
7 joint neutral expert, Judge Judith Becker, Ph.D., who was  
8 selected by Plaintiffs and Defendants, the thought being  
9 that a neutral expert would review the existing STU  
10 treatment program, offer her opinion on the program, and  
11 produce a report, which would be considered for purposes of  
12 settlement only. Dr. Becker issued her report on December  
13 29, 2008. And this was a helpful report, I believe, to the  
14 Plaintiffs.

15 In September 2011, again with the assistance of  
16 Judge Falk and hard work on behalf of counsel, the parties  
17 agreed to a tentative settlement, which required final  
18 approval from the highest levels of our state government.

19 On January 20, 2012, Judge Falk again held an  
20 in-person conference with counsel at which it was  
21 represented that counsel had authority to finalize the  
22 settlement. In attendance there were three lead Plaintiffs  
23 in the case, Alves, Culbreath, and Sessoms.

24 On February 3rd, 2012, the settlement agreement  
25 was executed. The settlement agreement requires the



1 Defendants to improve both the quantity and quality of  
2 mental health treatment offered at the STU, thereby  
3 affording class members a better chance of being released  
4 from the facility.

5 On March 24, 2012, the Plaintiffs filed an amended  
6 consolidated class action complaint. Shortly thereafter,  
7 the parties filed a joint motion for class certification and  
8 preliminary approval of the settlement. By order dated  
9 March 29, 2012, this Court certified a class consisting of  
10 all persons involuntarily confined to the STU under the Act  
11 pursuant to the Federal Rules of Civil Procedure 23(a) and  
12 23(b)(2), and found that the settlement was "preliminarily  
13 approved as fair, reasonable and adequate subject to further  
14 consideration by this Court" in the fairness hearing. As a  
15 class action certified under 23(b)(2), the class members do  
16 not have an option to opt out of the class.

17 The class includes approximately 471 residents of  
18 the STU. Notice of the settlement was provided to all class  
19 members, who were given a chance to submit objections.  
20 Approximately 156 objections have been received. Class  
21 counsel and Defendants have submitted a joint motion for  
22 final approval of the settlement. Pro bono counsel for the  
23 Bagarozzy Plaintiffs have submitted a brief in opposition to  
24 the settlement.

25 So we're here today for the purpose of that

1 fairness hearing.

2 That said, so the record knows what we're doing, I  
3 guess we should start right here.

4 I'll hear you.

5 MS. MOSES: Good morning, Your Honor.

6 Barbara Moses.

7 Two housekeeping matters, if I might.

8 The first is the manner in which we would like to  
9 present the motion, subject to Your Honor's approval.

10 Mr. Bruno, one of my students at Seton Hall, will  
11 briefly address the issue of whether the class was properly  
12 certified, which, as you know, is a consideration which must  
13 be revisited at this stage.

14 Ms. Savadjian will briefly address the adequacy of  
15 notice and the receipt and submission of the objections.

16 And Ms. Harper will briefly address the prior  
17 history of litigation by STU residents challenging the same  
18 or similar issues.

19 JUDGE CAVANAUGH: I think the operative word there  
20 would be "briefly."

21 MS. MOSES: Yes, and we have planned to take  
22 Your Honor's admonition to heart in advance.

23 The second housekeeping matter, Your Honor, is  
24 this. I would like to advise the Court that we received a  
25 letter on Friday, three days ago, dated November 5th, which

1 appears to be from Mr. Alves, Raymond Alves, our lead  
2 Plaintiff.

3 In this letter, Mr. Alves expresses  
4 dissatisfaction with class counsel and particularly with me,  
5 and seeks to have class counsel removed.

6 We have been unable to ascertain whether the  
7 letter accurately reflects Mr. Alves's current views because  
8 we were unable to visit the STU yesterday because it was  
9 Veterans Day, and our attempts to reach him by telephone  
10 were vigorous but unsuccessful.

11 The letter was addressed to the Bagarozzy  
12 Plaintiffs' counsel as well as to us and showed a cc to the  
13 Court, so we don't believe it was intended to be a  
14 confidential communication, and I have brought copies of  
15 that letter with me today since I did not see it on the  
16 Court's docket.

17 May I hand it up?

18 JUDGE CAVANAUGH: Yes, please.

19 (A document was handed up to the Court.)

20 MS. MOSES: We don't believe that this letter  
21 changes the issues for the Court on today's presentation,  
22 but we did want to make sure that the record was complete.

23 JUDGE CAVANAUGH: Okay. Let me just read this  
24 very quickly.

25 MS. MOSES: Sure.

1 JUDGE CAVANAUGH: Well, so the record is clear, he  
2 did write this letter dated November 5th to Greenberg  
3 Traurig, Seton Hall School of Law, the Center For Social  
4 Justice, and the Gibbons firm, To Whom It May Concern. He  
5 cc'd this Court.

6 I really don't know what he wants me to do with  
7 this.

8 He asks in here -- he asks someone -- I have  
9 nothing else before me -- that Ms. Moses be removed from the  
10 position of class counsel and an investigation into her  
11 behavior should be initiated to ensure that the course of  
12 this case that is taken is in line with what the class  
13 wants.

14 There will be no investigation, and I will not  
15 remove Ms. Moses as class counsel.

16 I understand that there was a similar motion  
17 previously brought before this Court, and I believe that an  
18 order and opinion with reasons denying it was submitted by  
19 Judge Falk at the time.

20 And I think that's the extent to which I'm going  
21 to deal with this letter.

22 MS. MOSES: To perhaps just to clarify the record  
23 on that subject somewhat, there was a previous motion by one  
24 of the objectors, Mr. Michael Hasher, for the appointment of  
25 new pro bono counsel for himself. He was not a named class

1       representative. He was a class member. I believe  
2       Judge Falk denied that motion, along with some other motions  
3       that Mr. Hasher made.

4               Also, over the course of the summer, another  
5       objector, who was at that time represented by counsel, by  
6       the name of Lorenzo Oliver, attempted to file a document  
7       which was titled a petition for the removal of class  
8       counsel. Although the document, the petition, was  
9       ultimately filed and appears on the Court's docket as an  
10      attachment to a letter from Mr. Oliver's former counsel,  
11      Mr. Neal Wiesner, I don't believe that that petition was  
12      ever docketed as a motion or that any decision was issued  
13      with regard to that purported petition.

14             JUDGE FALK: I did enter an order denying any  
15      request to replace class counsel with respect to Mr. Oliver,  
16      who was then represented by Mr. Wiesner. So it is on the  
17      record.

18             MS. MOSES: Thank you.

19             JUDGE FALK: And he has withdrawn from the case.

20             MS. MOSES: That's correct. Mr. Wiesner has  
21      withdrawn from the case.

22             JUDGE CAVANAUGH: Yes. I read his very  
23      entertaining motion also.

24             MS. MOSES: Yes, Your Honor.

25             JUDGE CAVANAUGH: Okay. All right. Well, then,

1 let's proceed then as you wish.

2 MS. MOSES: Thank you, Your Honor.

3 MR. BRUNO: Good morning, Your Honor.

4 JUDGE CAVANAUGH: And I want it known that I  
5 believe that Seton Hall is one of the two finest law schools  
6 in Newark, New Jersey.

7 (Laughter)

8 MR. BRUNO: Thank you, Your Honor.

9 The class was properly certified. The Defendants  
10 in this case consented to class certification. The class  
11 certification will also likely meet the Girsh factor of  
12 maintaining the class through trial because this class  
13 certification is not contingent or conditional upon approval  
14 of the settlement. Thus, if the settlement is not approved,  
15 the case will continue as a class action.

16 The class also meets the Rule 23(a) requirements  
17 of numerosity, commonality, typicality, and adequacy, and  
18 also meets the Rule 23(b)(2) requirements because we are  
19 seeking injunctive relief and the parties opposing the class  
20 have acted on grounds generally applicable to the class.

21 On the typicality requirement, there are no legal  
22 theories that would present a potential conflict in this  
23 case. All the residents at the STU are subject to the  
24 treatment, all the residents at the STU are dealing with the  
25 inadequacies of the mental health treatment, and all of the

1 residents at the STU would benefit from the improvements  
2 mandated by this settlement.

3 The adequacy is also met here because the  
4 interests of the class representatives are not antagonistic  
5 to that of the class, and class counsel is qualified,  
6 experienced, and generally able to conduct the proposed  
7 litigation.

8 There have been some objections to the substance  
9 of the settlement, but none of it that the class counsel is  
10 not qualified, experienced, and able to conduct this  
11 litigation.

12 As well, there was a few objectors who mentioned a  
13 possible conflict of interest. There is no conflict of  
14 interest here. Two Seton Hall law professors have written  
15 scholarly articles about the NJSVPA, but none of those  
16 authors ever represented the Defendants in litigation, nor  
17 have worked on this case, nor have been part of the Center  
18 For Social Justice.

19 We have already briefed these issues in the class  
20 certification, and the motion to approve class  
21 classification in March again touched on these issues, and  
22 the memorandum in support of final approval in July.

23 Thank you, Your Honor.

24 JUDGE CAVANAUGH: Thank you.

25 What year are you in; your third year?

1 MR. BRUNO: Yes, sir.

2 JUDGE CAVANAUGH: Okay. Thank you. I appreciate  
3 your assistance.

4 Next?

5 MS. SAVADJIAN: Good morning, Your Honor.

6 As Professor Moses previously stated, I will be  
7 addressing the adequacy of notice and opportunity to object  
8 given to the class members.

9 In accordance with Federal Rule 23(e), notice to  
10 the class was provided in a reasonable manner. In the  
11 Court's modified order dated April 4th, 2012, the Court  
12 issued a schedule for notice to be brought to the residents  
13 at the STU and objections to be submitted, and we have met  
14 those deadlines, Your Honor. Counsel for Defendants  
15 delivered the notices of the settlement to the 463 residents  
16 of the STU at the time, and as a result of these notices, we  
17 did receive back 156 timely objections to the settlement in  
18 which a class member appeared to express dissatisfaction  
19 with the settlement in whole or in part, and we erred on the  
20 side of caution when it was not clear whether or not that  
21 anyone ever intended to object to the settlement and we  
22 included it as an objection.

23 To date, we have not received any objections to  
24 the timeline or the content of the notice of the settlement,  
25 and, additionally, the fact that we received a volume of



1       these objections would indicate that the notice was adequate  
2       and the class members understood the settlement notice, and  
3       we understand that Your Honor has reviewed them.

4               And if you have no other questions, we will move  
5       to Rose Harper's portion of the presentation.

6               JUDGE CAVANAUGH: Thank you.

7               MS. HARPER: Your Honor, Rose Harper, speaking on  
8       prior litigation brought by class members.

9               To put the dispute in context in a way whether the  
10       settlement is sufficient in the improvements that it makes  
11       to the STU, it is useful to look at prior litigations  
12       brought by class members which allege similar issues to be  
13       addressed in the settlement. Some of these cases we have  
14       cited in our supporting papers.

15              Class members, including objectors and  
16       non-objectors, have brought prior litigation alleging  
17       similar issues that are addressed in the settlement, but  
18       none of those cases have fared well. Essentially, none of  
19       those cases have resulted in a mandatory change in the  
20       treatment program at the Special Treatment Unit. In Federal  
21       Court alone, we have found at least 29 cases which allege  
22       similar issues that are addressed in the settlement  
23       agreement, and of those cases, 12 were brought by timely  
24       objectors and seven were brought by Bagarozzy Plaintiffs. In  
25       the 29 cases, we found five cases alleged inadequate access

1 to therapists, 18 cases claimed interrupted treatment  
2 because a Plaintiff was placed on map or because the  
3 Plaintiff claimed that D.O.C. prevented their access to  
4 process groups, eight of the 29 cases alleged to being  
5 arbitrarily prevented from progressing through the program  
6 phases, and six cases alleged inadequate educational and  
7 recreational opportunities. The settlement agreement in  
8 this case directly addresses all of those issues.

9 All of the 29 cases that we found raised one or  
10 more of the same issues, and all but four of the cases have  
11 been dismissed, either by motion brought by the Defendants  
12 in the case or sua sponte by the Court. Additionally, five  
13 of those cases were dismissed with prejudice.

14 These 29 cases do not include the plethora of  
15 previous cases that were brought in State Court which went  
16 beyond the scope of the hearing today, but the fate of the  
17 Federal cases do show two main things: First, it is  
18 extremely difficult to achieve judicially mandated change in  
19 this area of law, and, second, that this settlement  
20 agreement will be the first time that this Court has  
21 mandated improvement to the Special Treatment Unit.

22 Thank you.

23 JUDGE CAVANAUGH: Thank you.

24 And I commend the students. I'm sure they did a  
25 lot of hard work and were somewhat nervous about coming

1       today. I think they did an excellent job. Thank you very  
2       much.

3               Counsel, anything further over here?

4               MR. DaCOSTA: No, Your Honor.

5               MR. MANES: No, Your Honor.

6               JUDGE CAVANAUGH: Anything further?

7               MS. MOSES: If I might, --

8               JUDGE CAVANAUGH: Yes.

9               MS. MOSES: -- Your Honor, and I will try to be  
10       brief.

11              JUDGE CAVANAUGH: Say whatever you need to say.

12              MS. MOSES: I'll still try to be brief.

13              JUDGE CAVANAUGH: It's appreciated.

14              MS. MOSES: There are, I think, three main points  
15       that I want to stress to Your Honor. I will try not to  
16       repeat what's in the briefs because I know that you have  
17       reviewed them carefully.

18              First is that while the settlement is not perfect  
19       and certainly does not achieve the highest hopes of many  
20       members of the Plaintiffs' class, it does achieve a great  
21       deal. It achieves much more than the Bagarozzy Plaintiffs  
22       give it credit for, and not just in comparison to the prior  
23       litigation, which Ms. Harper outlined for you, but it also  
24       achieves quite a lot standing on its own legs substantively.

25              In very broad outline, the settlement calls for

1 more therapy, both process groups and modules, more  
2 therapists, which the STU is already in the process of  
3 hiring, more contact time with the residents by each  
4 therapist, better communication to the residents of the  
5 goals and criteria for advancement through the program,  
6 which, as you know, is necessary before the STU recommends a  
7 resident for release.

8 If I could pause just a moment here, one of the  
9 most significant and most commonly repeated complaints that  
10 we heard from the named class representatives and from other  
11 members of the class is that they were having difficulty  
12 progressing through the phases of the treatment program,  
13 from phase one to phase five, because they didn't understand  
14 what they had to do to get to the next phase or how they  
15 would be evaluated or how long it would take. The  
16 settlement agreement will require the STU staff to be very  
17 clear with the residents about that in their initial  
18 treatment plan, at their six-month review, and at their  
19 annual review by the TPRC, the Treatment --

20 Help me, David.

21 MR. DaCOSTA: -- Progress Review Committee.

22 MS. NMOSES: Thank you -- the Treatment Progress  
23 Review Committee, and the residents now need to be told what  
24 objective criteria they need to meet for progression to the  
25 next phase, and they also need to be given a time estimate

1 of how long it should take them to do that, assuming that  
2 they apply themselves diligently and in good faith to the  
3 therapy.

4 The settlement includes improvements to the  
5 vocational, educational, and recreational opportunities at  
6 the STU. The settlement includes better discharge planning.  
7 Again, this has been a significant focus of complaint from  
8 the residents, because, before a residence can be  
9 recommended by the STU staff for conditional discharge, the  
10 resident generally needs to have a plan in place identifying  
11 matters such as where he will live, where he will receive  
12 whatever outpatient treatment that he's required to keep up  
13 with, about how he will support himself. For many of the  
14 residents, who served long prison sentences, followed in  
15 some cases by a decade or more in the STU, and without  
16 access, I might add, to the Internet, it's almost impossible  
17 for them to put these plans into place unless the social  
18 work staff at the STU is affirmatively required to help them  
19 do that. The settlement does affirmatively require the STU  
20 staff to help them do that for the first time.

21 The settlement provides for additional expert  
22 in-service training for the staff at the STU. It provides  
23 for a treatment ombudsperson so that the residents have  
24 someone to take their treatment-related claims to. We can't  
25 guarantee that they will like the response, but the

1 settlement does guarantee that they will get a response,  
2 that someone will look at those issues, look at them  
3 carefully, and get back to them with a response.

4 And, perhaps most importantly, the settlement  
5 calls for an independent monitor to be appointed by  
6 Your Honor to inspect the facility and monitor the  
7 Defendants' compliance with the settlement for a presumptive  
8 period of five years, subject to certain exceptions which  
9 are set forth in the settlement agreement. This is crucial,  
10 Your Honor, because there is a high degree of distrust among  
11 the class members as to the good faith of the Defendants and  
12 the STU staff, and a number of men have said to us, how can  
13 we be certain that the STU staff will comply with any  
14 settlement document written on a piece of paper? Many men  
15 complained that some of the rules and programs and policies  
16 and principles which in theory exist now on paper are not  
17 adhered to in practice, and the monitor will address both of  
18 those issues and we believe give the Court as well as class  
19 counsel and the class some comfort that what's in the  
20 settlement agreement will actually be carried out.

21 The second point I want to make, Your Honor, is  
22 that while the settlement certainly does not do everything  
23 that the class members would like to see done, we have also  
24 been very careful to make certain that the claims of class  
25 members which are not encompassed within the second amended

1 complaint will not be waived or barred in any way. So to  
2 give the most common example that we hear, many members of  
3 the class believe that claims need to be pursued not just  
4 against the Department of Human Services and the Defendants  
5 with whom we are settling who are responsible for the  
6 treatment program, but also against the Department of  
7 Corrections, which is responsible for the physical facility  
8 at the STU, the security which is provided by D.O.C.  
9 personnel, the medical treatment, and so forth. A number of  
10 the objections you received, as you know, complain that the  
11 settlement does not require improvements in this area, but  
12 what the settlement does do, and this is very clear both in  
13 the settlement itself, beginning on page one, and also in  
14 the proposed order that we submitted with our opening  
15 papers, is, it leaves those claims open to be pursued either  
16 on an individual or a class basis, if appropriate, by any  
17 member of the class. So those are the Bagarozzy Plaintiffs,  
18 who already have such claims pending. Those claims will not  
19 be dismissed, at least not by virtue of this settlement  
20 agreement. Those consolidated Plaintiffs who have  
21 idiosyncratic claims outside of the scope of the second  
22 amended complaint, for example, there's a resident by the  
23 name of Moore, William Moore, who has been attempting for  
24 some time to pursue a claim based on his right, I believe,  
25 to marry in a religious ceremony of his choice --

1 JUDGE CAVANAUGH: And I think Mr. Furlong has  
2 shown up, I don't know if he was here when we first started,  
3 but he's here, for the record. I think that's  
4 his --

5 MS. MOSES: Good morning.

6 MR. FURLONG: Thank you, Judge, for placing my  
7 appearance on the record.

8 JUDGE CAVANAUGH: Okay.

9 MS. MOSES: So I can't -- as long as Mr. Furlong  
10 is here, I will not speak of his client's case in detail,  
11 but I will say that the settlement agreement is crafted so  
12 as to make certain that claims outside the scope of the  
13 second amended complaint are not barred, waived, dismissed,  
14 or otherwise prejudiced by this agreement.

15 And the third and most important, in some ways,  
16 point, Your Honor, is that under the proposed settlement,  
17 the improvements mandated in the agreement will be put in  
18 place in most instances within six months, in some instances  
19 even sooner.

20 The alternative, which is continued litigation,  
21 carries two very significant risks. First, obviously,  
22 there's the risk that the Plaintiffs will not prevail, that  
23 the Defendants will prevail on liability, either on summary  
24 judgment or at trial. This has happened in other cases  
25 around the country challenging conditions in civil



1 commitment facilities. In the 8th Circuit, as you know, the  
2 courts have held that there is no right to adequate mental  
3 health treatment under the Due Process Clause for civilly  
4 committed former sex offenders. In Massachusetts, in a case  
5 called Hargett v. Adams, which is in our papers, the trial  
6 court entered summary judgment for the Defendants, finding  
7 that the conditions at the Massachusetts facility, while  
8 quite disturbing, did not fall below the minimally adequate  
9 level of care mandated by Youngberg v. Romeo and its  
10 progeny.

11 So our concern going forward is not that we would  
12 be unable to prove the factual allegations set forth in our  
13 complaint. We are highly confident that we would succeed on  
14 that front. But our concern flows from the difficult legal  
15 landscape as a result of Youngberg and its progeny.

16 The second risk, and a very real risk, again,  
17 Your Honor, assuming that the Plaintiffs are successful at  
18 trial, it's my obligation as class counsel to take a hard  
19 look at what the likely outcome is at trial, and at this  
20 stage of the case, when I am required to recommend or not  
21 recommend a settlement, I have to to a certain extent take  
22 off my advocate's hat and try to look very honestly at what  
23 I think the risks are on a litigation path. And one of  
24 those risks, Your Honor, we think, is that, should we  
25 prevail at trial, it's unlikely, not impossible, but

1       unlikely that the Court would order significantly more  
2       relief than the relief which is already negotiated and  
3       appears in the proposed settlement agreement, and it is not  
4       really likely but virtually certain that whatever relief we  
5       did achieve at the trial would arrive only after substantial  
6       additional delays, delays between now and trial, delays  
7       during the pendency of any appeal, potentially, although I  
8       hope this would not be the case, delays having to do with  
9       enforcement of the Court's injunctive order.

10               As you have seen from our papers, in the so-called  
11       Turay litigation from Washington State, it was something  
12       like seven years after the trial court entered its first  
13       post-trial order before the Defendants were actually  
14       required to engage in certain specified improvements in the  
15       conditions at the Washington State facility.

16               Now, this case has already been pending, as both  
17       of Your Honors are well aware, for over 10 years. The  
18       Plaintiffs are not getting any younger. If the treatment  
19       program improvements are to do the class members some good,  
20       those improvements need to be implemented now, and not years  
21       from now.

22               I looked at the cases which various counsel and  
23       parties have cited in the moving and opposing papers, and I  
24       think, Your Honor, that the case that this case most  
25       resembled in terms of the settlement calculation is the

1        Hawker case, Hawker v. Consovoy, in which another judge in  
2        this district approved a prison conditions settlement  
3        brought on behalf of prisoners who were allegedly denied  
4        timely and appropriate parole hearings. In Hawker, as here,  
5        there were a large number of objections from class members,  
6        including the class representatives, who wrote to the Court  
7        to say that class counsel had not acted in the best  
8        interests of the class. Also in Hawker, as here, many of  
9        the objections were unrealistic, sought relief not  
10       encompassed within the operative complaint or otherwise not  
11       available under law. Others argued in effect that the  
12       settlement simply wasn't good enough because it didn't  
13       provide for 100 percent or close to 100 percent of the  
14       relief that was sought in the complaint.

15                And the Court in the Hawker case properly, I  
16       think, did not measure the proposed settlement against the  
17       Plaintiff's highest hopes. It measured the settlement  
18       instead against what could realistically be expected at  
19       trial, including the inherent delays, and the Court  
20       concluded as follows: "Although it is possible that the  
21       class could achieve more favorable relief through further  
22       litigation, a better outcome is improbable, mostly due to  
23       the risks associated with establishing liability and the  
24       fact that additional delays in the resolution of this action  
25       tend to reduce the value of any future equitable relief."

1           We believe that further delays here would reduce  
2           the value of the equitable relief we have negotiated, relief  
3           that we believe is material, is significant, and will assist  
4           the class members in progressing more quickly through the  
5           treatment program at the STU and improve their ability to  
6           regain their freedom.

7           Unless Your Honor has further questions, we will  
8           rest on our briefs for the remaining issues.

9           JUDGE CAVANAUGH: No. Thank you very much.

10          Who wishes to be heard? Counsel?

11          MR. KISLIN: Good morning, Your Honor.

12          Jason Kislin from Greenberg Traurig on behalf of  
13          the Bagarozzy Plaintiffs.

14          Many of the Bagarozzy Plaintiffs have filed  
15          individual objections themselves and along with the other  
16          150 or so objections. What we've attempted to do on behalf  
17          of our clients is identify what we thought were the most  
18          compelling arguments, legal arguments, factual arguments to  
19          present to the Court in opposition to the motion for final  
20          approval. That by no means should undermine some of the  
21          other arguments and some of the other objections that were  
22          set forth by the individuals in the individual objections  
23          that the Court has received.

24          Ultimately, Your Honor, we believe that the  
25          settlement should not be granted final approval because the

1 movants have not established that it's fair, reasonable, and  
2 adequate in accordance with the Girsh factors, and, most  
3 importantly, we believe that the conclusions of the  
4 Court-appointed neutral expert, Dr. Becker, demonstrate that  
5 the settlement is not there in light of the risks of  
6 litigation, it's not there in light of the risks of  
7 establishing damages, it is not within the range of  
8 reasonableness with regards to the likely outcome at the end  
9 of trial, and it is not within the range of reasonableness  
10 in light of the best possible recovery.

11 Also, with no promise of funding, the settlement  
12 agreement, which is a contract between two parties here, is  
13 essentially illusory, and I will talk more about the  
14 illusory promise and what the movants have said about that  
15 in a little bit.

16 As Your Honor pointed out, our clients are not  
17 prisoners. They have been convicted, they have served their  
18 time, and they are now civilly committed pursuant to a  
19 statute. The statute as well as the Constitution requires  
20 them to receive treatment, adequate treatment, treatment  
21 that is minimally adequate to satisfy the constitutional  
22 standards that govern all of us.

23 And the settlement, while certainly it will  
24 improve the conditions, and we're not here saying that the  
25 settlement doesn't have any value, but what we're saying is

1       that the settlement doesn't do enough to bring the  
2       conditions and the treatment program up to the threshold of  
3       minimally adequate under the Constitution, and we say that  
4       largely because of the report of the neutral expert,  
5       Dr. Becker. Dr. Becker, who was selected by the State --  
6       the Plaintiffs had other experts in mind, but the State --

7               JUDGE CAVANAUGH: Well, wait a minute. I thought  
8       this doctor was agreed upon.

9               MR. KISLIN: Your Honor -- I'm sorry. The doctor  
10       was agreed upon, Your Honor, but during the process, each  
11       side submitted the experts that they wanted. The Plaintiffs  
12       submitted a list of experts that they wanted; the State  
13       submitted a list of experts that they wanted. Dr. Becker  
14       was on the State's list. The Plaintiffs would have  
15       preferred other doctors, but ultimately, we capitulated to  
16       the use of Dr. Becker, and Dr. Becker was appointed. So in  
17       our minds, the State, looking at Dr. Becker's credentials,  
18       said, this is the person who is the most -- the most  
19       adequate to review the program and make a determination as  
20       to whether the areas of the program that were negotiated  
21       between the parties are minimally adequate under the  
22       standards that they have to be minimally adequate under,  
23       namely, the Youngberg standard.

24               And Dr. Becker's report suggests if not directly  
25       evidences that the program is so deficient as to deprive the

1 residents of the purposes of the statute, which are to  
2 create a psychological treatment program which will  
3 ultimately lead to a conditional release. So, essentially,  
4 the treatment program is so deficient as to deprive them of  
5 what the statute requires.

6 So I won't go into great detail because it is in  
7 our papers the credentials of Dr. Becker, but needless to  
8 say, the State thought she was credentialed enough to speak  
9 to this program, the Court appointed her to speak for this  
10 program, and, indeed, she has a tremendous amount of  
11 experience and knowledge in the area of the treatment of  
12 sexual offenders. She has spent the greater part of her  
13 life's work devoted to this. She sits on boards and other  
14 advisory committees that are devoted to reviewing these  
15 types of treatments. And why is this important? It's  
16 important because, while there is no universal set of  
17 standards, the standard that's set out in Youngberg is, the  
18 treatment program has to be consistent with what an  
19 appropriate professional would consider reasonable.

20 We submit that Dr. Becker is that appropriate  
21 professional. In fact, the State, in putting her on their  
22 list, acknowledged that she is the appropriate professional.

23 And where, as here, the treatment that is being  
24 offered is such a substantial departure from the accepted  
25 professional judgment, practice, or standards, the treatment

1 providers, in this case, the treatment providers hired by  
2 the State, are not entitled to any presumption of validity.

3 So, here, what you have, Your Honor, is  
4 Dr. Becker's report. She is qualified, she is a  
5 professional in the industry, in the field, and she's saying  
6 the treatment levels are not minimally adequate to satisfy  
7 the constitutional standards, and here's what the State has  
8 to do in order to bring those treatment programs up to  
9 minimally compliant. And the settlement, as we point out in  
10 our brief, does not do enough. Again, we're not saying that  
11 it doesn't do anything. It does. But it doesn't do enough.

12 And I would point Your Honor to page 22 of our  
13 brief in which we lay out the very specific areas that  
14 Dr. Becker was required to review, what her assessment of  
15 those areas were, her recommendations for what needed to be  
16 done in those areas in order to bring the program up to  
17 minimally compliant, and where we point out in many cases  
18 the settlement agreement is simply silent.

19 So just by way of example, with regards to the  
20 gradual de-escalation of restraints, Dr. Becker found that  
21 the program was not minimally compliant with regards to that  
22 issue. And that issue is important, Your Honor, because the  
23 purpose of the program is to ultimately allow these  
24 individuals to re-enter society, and if the restraints on  
25 these individuals aren't gradually de-escalated, then there



1       won't be a smooth transition to society. So Dr. Becker  
2       reviewed that area, how the program addresses that area, she  
3       found it wasn't minimally compliant.

4               And what did she say that the program had to do?  
5       Offer greater opportunities for furloughs, supervised  
6       furloughs into the community, creation of the group home,  
7       increased visitation and recreational schedules, changes in  
8       the living arrangements. And the settlement agreement,  
9       quite frankly, is silent on all of those recommendations.  
10      And that is just one of five or six areas where the  
11      settlement agreement does not speak at all to the  
12      recommendations that are made by Dr. Becker.

13             And again, the reason that Dr. Becker's report is  
14      critical here is because it speaks to the Girsh factors. So  
15      let's talk quickly about the Girsh factors.

16             JUDGE CAVANAUGH: I am familiar with them, but you  
17      may if you wish.

18             MR. KISLIN: Understood, and I'll be very brief,  
19      Judge.

20             Risk of establishing liability. We submit that  
21      the risk of establishing liability based on Dr. Becker's  
22      report is minimal, if any.

23             Risk of establishing damages. As Ms. Moses points  
24      out, the damages portion of the case is not being resolved  
25      here; it only resolves the injunctive relief portion. But

1 as to the injunctive relief sought, we believe that  
2 Dr. Becker's report gives the Court the framework of what  
3 needs to be done in order to bring the program up to minimal  
4 compliance. So the risk of establishing the injunctive  
5 relief we believe is minimal, if any.

6 And the same thing with regards to the range of  
7 reasonableness of the settlement in light of the risks and  
8 in light of the best possible outcome.

9 And with regards to the complexity and duration of  
10 the litigation, Judge, granted, this case has been pending  
11 for 10 years, and we definitely appreciate the sentiment of  
12 class counsel that, let's get something done. But we've  
13 heard from many, many of the Plaintiffs here, and they would  
14 prefer to get something done that brings the program up to  
15 minimally compliant and has some teeth to it and accept that  
16 there is going to be some additional delay. They would  
17 prefer that than to have a settlement that doesn't meet the  
18 constitutional standards and that doesn't have any real  
19 enforcement mechanism built into it.

20 And that brings me to the next point, Judge, which  
21 is that the settlement agreement here, with no promise of  
22 funding, is really just an illusory contract. The State has  
23 not bound itself to do anything. If it can't fund these  
24 programs, if it can't fund the reforms, then it can't meet  
25 its obligations under the agreement, and here, there is no

1 provision for funding. There's not even a promise that the  
2 governor will ask the legislature for funding. In fact,  
3 it's just the opposite: It's a complete disclaimer that,  
4 we'll do our best to get the governor to put it in the  
5 budget, but, you know, we can't control the governor, and  
6 even if the governor does get it into the budget, we can't  
7 control the legislature.

8 And what's the remedy? Well, the remedy is, well,  
9 you can restart the litigation. But if that's the case,  
10 Judge, then who knows how long from now we -- it's likely  
11 we'll be back before the Court saying, they, don't have the  
12 funding, they can't institute these reforms, so here we are  
13 again.

14 Again, that goes to the complexity and duration of  
15 litigation, because the purpose of the settlement is to save  
16 the Court and the parties time, money, resources, and  
17 without that definitive funding, we don't believe that the  
18 settlement does that.

19 Now, in response to that, the moving parties have  
20 pointed out a couple of settlements in the past that the  
21 Government has funded. One is from I believe 1999 and one  
22 is from I believe 2005. But, importantly, in each of those  
23 agreements, there was a commitment by the governor to  
24 include in the budget the funding that the parties agreed  
25 was necessary. In one of the provisions -- I'm sorry, in

1       one of the cases, the matter was left open pending a  
2       determination by the legislature as to whether the budget  
3       would be approved. If it wasn't approved, then the case was  
4       going to go forward. In the other instance, there was a  
5       very detailed dispute resolution program built in, and if  
6       the budget wasn't approved, then the parties would meet,  
7       they would negotiate, and there were very definitive steps,  
8       with reinstituting the litigation being the very last  
9       resort, because, again, if your only remedy if the State  
10      doesn't fund is to come back to court and reopen the  
11      litigation, it doesn't really achieve the goals of the  
12      settlement.

13               We would also point out, Judge, in  
14      Wyatt v. Aderholt, which is a 5th Circuit case from 1994  
15      which stands for the proposition that the budgetary concerns  
16      cannot stand in the way of the state satisfying its  
17      constitutional obligations, in this case, the constitutional  
18      obligation to provide minimally adequate treatment. So  
19      while counsel points out that assuming the success, it could  
20      take years, yes, we understand that, and ultimately, the  
21      parties might not get anything more than what's in the  
22      settlement, but if it's obtained through a judgment which is  
23      accompanied by the force of court, while it may take time to  
24      enforce that judgment, at least the parties have that, and  
25      the State can't say, Well, we can't fund this, so you're not

1 going to get any benefits.

2 So, again, I think many of the objectors pointed  
3 out they would prefer to proceed to judgment on the back of  
4 the expert report, whether it's Dr. Becker's report, which  
5 was submitted for settlement purposes only, we have other  
6 expert reports that seem to indicate basically the same  
7 conclusions that Dr. Becker indicates, so the Plaintiffs  
8 would prefer to proceed and get a judgment that will be  
9 enforceable even if it's going to take a little bit more  
10 time.

11 And lastly, Judge, I just come back to the  
12 reaction of the settlement class. Here you have over one  
13 third of the potential class members objecting, including  
14 two of the three named class members, which in and of itself  
15 is not determinative but certainly speaks volumes as to what  
16 the residents in the Special Treatment Unit think of the  
17 settlement as it's been negotiated. Again, we've attempted  
18 to consolidate the objections and put forth the objections  
19 that we believe are most compelling to the Court, some of  
20 the other objections, included objections to the class and  
21 the certification of the class. And we would urge the  
22 Court, as I'm sure it has, to consider those objections, and  
23 those objections represent the voice of the absent class  
24 members, whose interests here must be protected, especially  
25 because there is no opportunity to opt out. Once the

1 settlement is approved, everyone's a part of it, and these  
2 particular claims go away for all of the Plaintiffs here.

3 And unless the Court has any other questions...

4 JUDGE CAVANAUGH: Thank you.

5 MR. KISLIN: Thank you.

6 JUDGE CAVANAUGH: Before we have you respond, let  
7 me see, Mr. Furlong, do you have anything you want to say?

8 MR. FURLONG: I apologize, Your Honor, because I  
9 was one of the people stuck on Route 202 and I was late for  
10 the proceeding.

11 And Judge Falk has always been very indulgent of  
12 my -- schedule, put it that way.

13 I don't know if counsel specifically preserved  
14 Mr. Moore and Ms. Hysler's objection that -- there is a very  
15 tortured procedural history with a separate docket number,  
16 but I was going to seek some arcane procedural relief from  
17 the Court at the conclusion of the proceeding, unless  
18 Your Honor wanted to hear it now.

19 JUDGE CAVANAUGH: I'll hear it now.

20 MR. FURLONG: Very well, Your Honor.

21 Mr. Moore, a resident of the STU, and Ms. Hysler  
22 are engaged to be married. We filed suit under  
23 Moore v. Brown, Docket 05-2179. There were four counts in  
24 the complaint, one with respect to the exercise of religious  
25 liberty, one with respect to his right to marry, and two

1 with respect to the common claims here, conditions of  
2 confinement and the treatment protocol.

3 The state moved to dismiss or in the alternative  
4 for summary judgment on the first two claims. The matter  
5 was fully briefed before Judge Lifland, who was pending  
6 retirement, although he didn't bother to tell me that, but I  
7 don't think he's obligated to tell me that.

8 JUDGE CAVANAUGH: He does that.

9 (Laughter)

10 MR. FURLONG: You know, he thinks that if your  
11 hair goes white, you're allowed to go home. I don't know  
12 what that --

13 (Laughter)

14 JUDGE CAVANAUGH: I was hoping for that.

15 (Laughter)

16 MR. FURLONG: I meant naturally white.

17 No, no, I'm kidding.

18 (Laughter)

19 MR. FURLONG: In any event, we consented to a  
20 consolidation of the larger claims into the Alves litigation  
21 with the understanding that the underlying summary judgment  
22 motion was going to be decided, and in response to  
23 Judge Falk's letter to me --

24 JUDGE CAVANAUGH: Are you seeking a severance?

25 MR. FURLONG: Of those claims so that that motion

1       can be decided pursuant to Rule 21, as Judge Falk suggested  
2       in his letter to me of July 2nd.

3               JUDGE CAVANAUGH:   Yes.

4               MR. FURLONG:   And let me take this opportunity to  
5       commend Judge Falk for his perseverance.   Since the day he  
6       took the bench, I think, Your Honor landed him with this  
7       case --

8               JUDGE FALK:   Thank you, sir.

9               MR. FURLONG:   -- And he's been extremely patient.

10              JUDGE CAVANAUGH:   Well, on occasion.

11              (Laughter)

12              JUDGE CAVANAUGH:   Thank you.   I think we're going  
13       to wind up severing your matter anyway and dealing with  
14       that.

15              MR. FURLONG:   Very well, Your Honor.

16              JUDGE CAVANAUGH:   You've preserved what I think  
17       you have to preserve here.

18              MR. FURLONG:   I've communicated my objection to  
19       class counsel, and I think I've stated my case, Your Honor.

20              JUDGE CAVANAUGH:   I think Ms. Moses was about to  
21       get into that before you stood up in court, but I think  
22       you've protected your client.

23              MR. FURLONG:   Very well, Your Honor.   Thank you.

24              JUDGE CAVANAUGH:   Do you wish to respond to -- or  
25       the Attorney General may also respond.



1 MS. MOSES: David?

2 MR. DaCOSTA: I'll leave it to Ms. Moses.

3 MS. MOSES: If only he were like that all the  
4 time.

5 (Laughter)

6 MS. MOSES: With respect to Mr. Kislin's  
7 presentation, we, class counsel at Seton Hall Center For  
8 Social Justice and Gibbons, like Mr. Kislin and Mr. Marx and  
9 the Greenberg Traurig lawyers, would have liked to negotiate  
10 more of Dr. Becker's recommendation into the settlement  
11 agreement, and we tried pretty hard to do that, as is set  
12 forth in the declaration of Baher Azmy, my predecessor, and  
13 Mr. DaCosta, and as Judge Falk knows from his personal  
14 involvement in the case.

15 Where we part company with the Bagarozy Plaintiffs  
16 on this issue is our respective assessment of whether the  
17 Plaintiffs would likely achieve more of those  
18 recommendations should the case proceed to trial.

19 The Bagarozy Plaintiffs argue in essence that  
20 since Dr. Becker was, quote, appointed by the Court, close  
21 quote -- which I must hasten to add, she was not; she was  
22 chosen by the parties, retained and paid by the parties.  
23 The Court did execute a stipulated order governing  
24 settlement procedures, which appears in the docket as  
25 document number 214 --

1 JUDGE CAVANAUGH: Yes, that's my recollection,  
2 that she was --

3 MS. MOSES: -- at the moment.

4 JUDGE CAVANAUGH: -- presented to me, to Judge  
5 Falk as agreed upon by the parties and as an individual who  
6 had the expertise to do what you needed to have done.

7 MS. MOSES: That's correct.

8 JUDGE CAVANAUGH: I think the argument that  
9 counsel was making, I took it as more going to the fact that  
10 since the name was originally presented by the State that  
11 then they should recognize the obligation to do all the  
12 things that she recommended, as opposed to some of them  
13 pursuant to the settlement. I think he was just saying this  
14 adds credence to his argument that the State recognizes that  
15 her recommendations would be the appropriate recommendation.

16 MS. MOSES: Well, I see Mr. Kislin nodding. I  
17 actually think that's half of the Bagarozzy Plaintiffs'  
18 argument. I think they go a bit further and argue, as  
19 Mr. Kislin just said, that in their view, the risk of  
20 establishing liability is minimal at trial because of the  
21 Becker report, the argument I think being that the State  
22 would not be in a position at trial to contest Becker's  
23 recommendation.

24 JUDGE CAVANAUGH: Perhaps -- I was suggesting the  
25 same thing.

1 MS. MOSES: So, again, putting on my scrupulously  
2 jaundiced eye, which is, in a sense, the kind of eye you  
3 need to employ at settlement, I think the problem with that  
4 approach -- there are a couple of problems with that  
5 approach. First, the Becker report may not be admissible at  
6 trial, as Your Honor recited --

7 JUDGE CAVANAUGH: Well, for settlement only.

8 MS. MOSES: Well, that's what Your Honor said  
9 during your presentation at the outset this morning, and I  
10 know that that's the position of Mr. DaCosta and the  
11 Attorney General's Office. On behalf of Plaintiffs and the  
12 class, we would take a different position. My predecessor,  
13 Baher Azmy, does not recall any understanding to that  
14 effect. It doesn't say that in the order governing  
15 settlement procedures. But at a minimum, there would be a  
16 fight over that, and I can't predict how that fight would  
17 come out. So that is a real consideration, Your Honor.

18 Secondly, it is not the case that Dr. Becker --  
19 and I'm trying to quote from my friend on behalf of the  
20 Bagarozzy Plaintiffs -- it is not the case that Dr. Becker  
21 assessed adequacy, quote, under the standards, they have to  
22 be minimally adequate under mainly the Youngberg standard,  
23 close quote.

24 If you look again at the order governing  
25 settlement procedures, it doesn't say anything about the

1        Youngberg standard, either expressly or in substance.

2        Rather, it says that she will use the professional standards  
3        that she deems most adequate. And as counsel acknowledged,  
4        there are no universal set of professional standards for sex  
5        offender treatment programs such as the program at the STU.

6                And the Youngberg standard, as I mentioned earlier  
7        -- unfortunately; I wish this were otherwise -- the  
8        Youngberg standard does not say that a treatment program  
9        must come up to the level deemed appropriate by a well  
10        respected practitioner and scholar in the field such as  
11        Dr. Becker. The Youngberg standard instead says, and I am  
12        now paraphrasing, that minimally adequate means it has to be  
13        acceptable to some professional somewhere who is not so far  
14        off the map that it can be said that no professional  
15        judgment was exercised.

16                There is a wide range of expert opinion in the  
17        field of sex offender treatment, former sex offender  
18        treatment. Just anecdotally, the director of the STU and  
19        the lead Defendant in this case, Dr. Merril Main, has been  
20        qualified and testified as an expert in the Strutton v. Mead  
21        case out in the 8th Circuit, where he testified that  
22        treatment substantially less adequate than the treatment  
23        that currently exists at the STU would be in his judgment  
24        minimally adequate under professional standards. I am by no  
25        means endorsing --

1 JUDGE CAVANAUGH: I understand.

2 MS. MOSES: -- Dr. Main's view. I merely point  
3 out that there is a wide range of professional opinion on  
4 this subject, and I don't believe, looking very closely at  
5 Dr. Becker's report and at the order governing settlement  
6 procedures, that there is an easy jump from what Dr. Becker  
7 said to what the Constitution mandates.

8 And finally on that point, I would simply mention  
9 again that the reason I think the Bagarozy Plaintiffs depend  
10 so heavily on the Becker report is that they don't have any  
11 cases which tell them that what Dr. Becker recommends is, in  
12 fact, what the Constitution requires. When you look at the  
13 cases out there that have been litigated, when you look even  
14 at the one case out there, the Canupp case in Florida, which  
15 has been settled and as to which the Court approved the  
16 settlement under Rule 23, you don't see anything like the  
17 full panoply of improvements that Dr. Becker recommended.

18 Turning to the funding provisions, I think there  
19 are two cases that pretty much dispose of the funding  
20 contention. The first is Lavelle v. Monsanto, cited by the  
21 Bagarozy Plaintiffs, which held that a settlement with a  
22 funding contingency was inadequate, but not because of the  
23 danger that the funding wouldn't come through, in that case  
24 from the Federal Government, from Congress. Rather, in  
25 Lavelle, the Court's concern was that the Plaintiffs had no

1 recourse at all in the event that the funding did not come  
2 through. They did not have the ability to declare the  
3 settlement agreement void and to return to litigation. And  
4 in a footnote, the Court suggested strongly that if the  
5 provision had been written to permit the Plaintiffs to  
6 resume litigation in the event of inadequate funding, then  
7 the problem would be substantially alleviated.

8 The second case is Austin v. The Pennsylvania  
9 Department of Corrections from the Eastern District of  
10 Pennsylvania. In that case, nothing in the settlement  
11 agreement was enforceable. The funding provision was not  
12 enforceable, and the substantive provisions were not  
13 enforceable. The only recourse that the Plaintiffs had as  
14 to anything written in the settlement agreement was to  
15 declare the agreement void and to recommence litigation, and  
16 the district judge in Austin felt that that was adequate  
17 enforcement under the circumstances.

18 Finally, there is an empirical question here as  
19 well, which is how likely is it that the State is going to  
20 fail to come up with the required funding.

21 I obviously hope that that is not the case. What  
22 I can report to the Court is, I have not seen any indication  
23 to date that the State is unlikely to come up with the  
24 funding.

25 In the prior cases, as the Bagarozzy Plaintiffs'

1       counsel mentioned, the State has entered into similar  
2       settlement agreements which have not collapsed or been  
3       voided for lack of funding.

4               With regard to the current settlement agreement --  
5       you can see this from the declarations of Dr. Main -- the  
6       Defendants have already begun to implement provisions of the  
7       settlement agreement, and they have done so with funds that  
8       were appropriated as part of the 2013 appropriations act,  
9       which, you know, we're in the middle of fiscal 2013 now.  
10      They have posted psychologist positions for hire; they have  
11      hired a couple of them already at last count. They had the  
12      funds to hire more. And I'm just not seeing the indicia  
13      that I would be looking for, that I have been looking for  
14      and that I would worry about if what we had here was a  
15      likelihood of financial default.

16             So I obviously can't make any guarantees to the  
17      Court; the State hasn't made them to us, and I would not  
18      attempt to predict the future here. But what I can say is  
19      that I don't see any legal or empirical support for the  
20      notion that the funding provision makes the settlement  
21      inadequate.

22             And unless the Court has further questions...

23             JUDGE CAVANAUGH: Anybody else have anything to  
24      say on the subject?

25             MR. DaCOSTA: No, Your Honor.

1 JUDGE CAVANAUGH: All right.

2 Did you have anything to say, Judge Falk?

3 JUDGE FALK: No.

4 JUDGE CAVANAUGH: There is a lot in front of the  
5 Court here, as it was our obligation to have this hearing to  
6 let you advise us of your concerns, of your positions. You  
7 have done that. You have also done that in your filed  
8 papers.

9 The Court is going to reserve on both its ultimate  
10 ruling, because I would like to go back and digest some of  
11 this. We're going to get a copy of the transcript, we're  
12 going to look at this carefully, and I would think within  
13 two weeks' time, we will enter an opinion and order  
14 regarding our position as to the settlement.

15 I would like to commend counsel for all the hard  
16 work that you've done on behalf of these individuals. It's  
17 a very difficult situation. The Court is well aware of the  
18 tensions involved with constitutional rights of individuals  
19 and the mandates upon the State to protect its citizens and  
20 the problems that we've all encountered. That's one of the  
21 reasons this case has been around so long.

22 And I am hopeful that one way or the other we will  
23 bring some resolution and do the right thing for all  
24 involved.

25 Thank you very much.



1 MS. MOSES: Your Honor, Plaintiffs thank you, Your  
2 Honor.

3 MR. KISLIN: Thank you.

4 MS. MOSES: One thing more, and I apologize.

5 Our class representatives, as you know, were  
6 unable to be with us today because they are incarcerated at  
7 the Special Treatment Unit, as are most of the objectors.  
8 But in looking around the courtroom just now, I believe I  
9 saw Mr. Minatee? Is that correct? And who else?

10 FROM THE GALLERY: Mr. Brooks. Mr. Brooks.

11 MS. MOSES: And Mr. Brooks, who are former  
12 residents of the Special Treatment Unit who have been  
13 conditionally discharged, and they were able to come to the  
14 hearing today, and I just wanted the Court to be aware of  
15 their presence.

16 JUDGE CAVANAUGH: Did they want to address the  
17 Court in any way?

18 MR. LAMONT BROOKS: I would like to address the  
19 Court, Your Honor.

20 JUDGE CAVANAUGH: All right.

21 MR. BROOKS: From here?

22 JUDGE CAVANAUGH: Come on up here, sir.

23 MR. BROOKS: Good afternoon.

24 My name is Lamont Brooks. I'm one of the first 27  
25 complainants about the violation that was imposed against my

1 constitutional rights at the STU Annex.

2 As of 2003, I was civilly committed under  
3 conditions that were appalling. My constitutional rights  
4 were violated across the board by the State of New Jersey.

5 Representative by Mr. Ian Marx -- I think that's  
6 who he is -- represented the Plaintiffs, and Ms. Moses  
7 represents Seton Hall, and they represent a very few of the  
8 population.

9 STU has been trying somewhat to continue to sweep  
10 the violations that they imposed upon the residents there  
11 under the rug. They brought in Ms. -- what was her name?

12 MS. MOSES: Dr. Becker?

13 MR. BROOKS: Dr. Becker. Thank you.

14 They brought in Dr. Becker to give an evaluation  
15 of the violations of the constitutional rights that was  
16 against us, that was being done against us.

17 As of 2012, February, I was granted a conditional  
18 discharge release. I had two aggravated sexual assaults on  
19 adult women. Not to say that my conduct and behavior is  
20 supposed to be accepted by lawful society, because I  
21 understand that, the violations, and I know they're not  
22 accepted by society. I did 15 years of treatment. And I  
23 was granted my release as of September 2012, the 6th, of  
24 2012, I was granted my release. I'm on a -- I'm on a  
25 tracking device that I have to report to parole with, and

1       they keep on -- aware of my surroundings and where I go at.  
2       It's tracking me.

3               These things here was asked for by the residents  
4       back in 2007. It was denied. Not to say that everyone  
5       should have this opportunity, Your Honor, because I  
6       understand that. I was there, and I do know the severities  
7       of some charges that are there. I'm not saying that. But  
8       the constitutional rights, what I'm saying, as a human  
9       being, has been violated.

10              Now, I'm not saying that everybody at the STU  
11       Annex deserves to be released because I know that that's not  
12       going to happen, Judge. But the rights of the Constitution  
13       should be upheld. The human rights, the human rights should  
14       be upheld.

15              The living conditions are appalling, Your Honor.  
16       You know, when you stack these 12 chairs here and you put 36  
17       guys in these 12 chairs, that's appalling. I lived in the  
18       conditions - 86 men with four toilets to use, two urinals,  
19       three showers, and two -- and three sinks. I have to wait  
20       in line to use the bathroom, and a lot of those guys had to  
21       do the same thing.

22              I appreciated counsel, the way that they tried to  
23       represent us. And we would just like -- the guys at the STU  
24       would just like to be represented properly. Not saying that  
25       counsel isn't representing us properly, but they would like

1 to be represented properly and would like Dr. Becker's  
2 report to be the full front of our complaint, because she  
3 gave a decent, honest report. She talked to the guys there,  
4 and she represented us properly.

5 The State chose Ms. Becker. The State chose  
6 Ms. Becker. We didn't have the opportunity to choose who we  
7 wanted, but we allowed the State to choose, and they chose  
8 Ms. Becker, and now they don't want Ms. Becker's report to  
9 be heard properly. And that's kind of, you know, sad --  
10 it's sad. It's sad.

11 Another thing that is being done at STU, when I'm  
12 granted conditional release, Your Honor, I have to come, I  
13 have to pay my own freight. I have to save up money. I'm  
14 not allowed to collect taxes, I'm not allowed to pay taxes.  
15 Your taxpayer dollars support STU. I make a minimum wage.  
16 I make \$4 an hour at the STU Annex. And 7.25 an hour, I  
17 can't collect taxes, I can't pay taxes, and I'm not allowed  
18 to collect Social Security.

19 But then I have to come into normal society and  
20 live like everybody else lives. I don't have a job. I  
21 haven't been able to get a job. I've been trying to, but I  
22 haven't been fortunate enough yet. And my rent is \$500 a  
23 month. Once my money runs out and I can't pay my rent no  
24 more and welfare is not affordable to continue to help me  
25 pay my rent, I have to return to the STU Annex, and then I

1       have to go back there and earn a living again to come back  
2       to normal society.

3               Mr. Minatee pays a thousand dollars a month rent,  
4       and he lives in a rooming house as well.

5               The State told us that once we are released that  
6       they would have funding for us that we could collect and it  
7       would be towards our living conditions, to help us pay our  
8       rent and our well-being in society, for the well-being of  
9       the rest of society.

10              None of these things up here are given to us. I  
11       have to go to One Stop Career Center and I have to go down  
12       there, look for a job, which is -- which is normal, for the  
13       normal working family, the working people of society, that's  
14       normal. I have to go to welfare and try to get some  
15       beneficial benefits, and that's normal for anybody that's  
16       struggling in society. I have to go to other agencies and  
17       try to get some help from other agencies, when the number  
18       one agency that's supposed to help me is not helping me, and  
19       that's the STU Annex.

20              They tell us these things, and we get millions of  
21       dollars, State give millions of dollars to the STU Annex,  
22       millions, to pay guys a minimum wage and start at the STU  
23       Annex, and for every guy that's there right now -- pardon  
24       me. For every guy that was released right now, it's still  
25       being -- still on the records as STU Annex as I'm still

1       there. Me myself, I'm still on the records, they're still  
2       getting money, a grant for me, and I'm released. That  
3       grant's supposed to come to me.

4               Your Honor, it's real, real, real -- it hurt a lot  
5       to see the medical department refuse a human being his  
6       proper rights for medical treatment. Your Honor, I was  
7       there in the STU unit for 10 years. I was there 2003 to the  
8       present day, and to present day up to being released, and I  
9       have seen 36 guys die from cancer, heart attacks - just a  
10      blatant malpractice of the medical department. You talk  
11      about treatment. I been to treatment, talking about my  
12      crime for the last 10, 15 years, the same crime, and I  
13      couldn't move forward if I didn't talk about this crime,  
14      which I had no problem doing. If you're going to continue  
15      to hold me to my past, then I will never -- you will never  
16      allow me to change, you will never allow me to move forward  
17      in life. And that's what's been going on in the STU Annex.  
18      If the only thing being focused on is my past and not who I  
19      am today, then something's wrong.

20             Fortunately, I made it through, Your Honor, and I  
21      tried to prove to them that I am a changed man. I'm willing  
22      to come out here into society and live in the normal society  
23      and follow the laws of society, abide by all the rules.

24             I know one of the rules says no more victims. You  
25      know, we have a pledge in the STU Annex, and the pledge goes

1       like this here, Your Honor: I vow to uphold the right of  
2       every individual, to not violate or deny anybody their own  
3       mutual rights as a human being.

4               Your Honor, if it please the Court, I was in the  
5       therapeutic community for three years. The therapeutic  
6       community is the one way that you can be transitioned out of  
7       STU Annex. It separates the whole top population. I do the  
8       same treatment as the rest of the population, but they put  
9       you in the TC, the therapeutic community, because they get a  
10      Federal grant for the therapeutic community, and that is the  
11      way that you transition out of the STU Annex. You cannot  
12      transition out of the STU Annex if you don't go through the  
13      therapeutic community. It's what they tell the residents  
14      there. And it's not true. It's not true, because  
15      Mr. Minatee didn't come through STU Annex upon his  
16      discharge. He was once in the TC. They kicked him out of  
17      the TC. And they tell each and every resident there, if you  
18      want to be released, you have to go through the TC  
19      community, which they get a Federal grant for every year  
20      during the fiscal year, they get money just for this part of  
21      the program. This part of the program is a dorm itself. It  
22      isn't part of the population. This is a dorm. And this  
23      dorm housed -- I think it housed 82 men. This has been  
24      going on for quite some time at the STU Annex.

25             It's -- it's really, really, really sad, because a

1 lot of guys there today, they realize they was taught to  
2 look at their behaviors. A lot of guys won't get out, Your  
3 Honor. A lot of guys have been told they're never getting  
4 out. Which is understandable, because some guys did some  
5 real horrific stuff, and not to say that what I did was any  
6 less or worse than they did. We all violated the laws of  
7 society, and I understand that. We just want rights to be  
8 upheld, the rights, that they be upheld, you know?

9 And you hold me accountable, Your Honor, if I do  
10 something wrong. I was held accountable. You know, I had  
11 to go and I had to serve my time. Then I was sent to the  
12 STU Annex. After serving my time, I was sent to the STU  
13 Annex because they said that I had enough treatment. So I  
14 was angry, I was disappointed, I was hurt. You know, you  
15 took my life. Not you, not to say the Court here, but I  
16 blame people. And my thing was, you took my life, took my  
17 life away from me for 10 years. I served my five-year  
18 sentence. Maybe it wasn't enough. Then I come to terms  
19 that maybe I did need a little more treatment. I come to  
20 terms with, okay, I got understanding now. I see the help  
21 that you try to offer. But did it really take 10 years of  
22 my life for you to offer me some help?

23 JUDGE CAVANAUGH: All right. Well, thank you. I  
24 appreciate your comments.

25 Do you want to say something, sir?



1 MR. DOUGLAS MINATEE: Yes, if I can.

2 Good morning, Your Honor.

3 JUDGE CAVANAUGH: Good morning.

4 MR. MINATEE: I ask God to give me the right words  
5 today, because I didn't expect to be out here.

6 I've been released back in 2007, and my cousin, he  
7 was a sex offender, so they put me back in the STU unit.  
8 Waited two more years to get out. Had another problem with  
9 the same cousin.

10 What I want to speak about today, if I can, is the  
11 discharge plans that they give people.

12 I am in a place -- I am in a place, a class E  
13 boarding home, which costs me a thousand dollars. I only  
14 have \$4,000 when I get out. All of that -- all of that is  
15 depleted right now. I been down to welfare several times.  
16 They wouldn't give me benefits because I'm in a class E  
17 boarding home. I've been to the One Stop Career Center.  
18 I've been doing everything not to repeat my past, not to get  
19 back on drugs, not to make any more victims. But I was  
20 given a little bit of help from the STU Annex. I have a  
21 social worker named Hector Rodriguez, which I contact all  
22 the time, you know, to whatever I'm doing. I felt that I  
23 was set up, you know, because I been trying to find jobs,  
24 but if you Google my name, you get sex offender, you get my  
25 PCR case, which I thought shouldn't even be on the record.

1 I've been in STU since -- I been committed since  
2 1999. I been committed on my father's -- the same day my  
3 father went in the ground, that's the same day I was  
4 committed.

5 I understand that my crime was wrong. I molested  
6 a four-year-old girl. And I'm willing to take full  
7 responsibility for everything I have done. But at this  
8 point, I cannot visit my daughter in Tampa, cannot visit my  
9 sisters in North Carolina or Virginia. I'm on a tracking  
10 device also. When I committed my crimes, none of these  
11 things were in effect. I can't get any help from counsel,  
12 you know, on these matters, because it seems as though it's  
13 being ran retroactive when the Appellate Division said it  
14 shouldn't be ran retroactive. If you look at my name, you  
15 will see that I have several lawsuits in these courts, and  
16 some of them were maybe not as strong as they should be  
17 because I'm not a lawyer myself. But I feel as though that  
18 there is a lot of suffering in the STU Annex, you know,  
19 there's a lot of noise in there. To me, I think it's more  
20 of a dungeon than a treatment center. This is my opinion.  
21 I may be wrong. Some people do get better and get out, you  
22 know. But they have to do the right thing.

23 I'm just thankful to be able to express myself  
24 today on the streets and not there, and to let society know  
25 that they can be safe with me out there. I don't have a

1        huge record of molesting kids, and I would like -- kind of  
2        like to get my past, put it in its right proper perspective  
3        place. I don't mind registering. I don't mind doing  
4        anything to stay out here, you know.

5                    And I would just like to thank the Court for its  
6        time and its patience. Thank you.

7                    JUDGE CAVANAUGH: Thank you.

8                    I appreciate both of your comments.

9                    Anything further, counsel?

10                   MS. MOSES: Nothing further, Your Honor.

11                   JUDGE CAVANAUGH: All right. Well, again, I  
12        appreciate, gentlemen, that you came in here today,  
13        appreciate counsel, and as I stated earlier, we will give  
14        this our full attention and get something out to you,  
15        hopefully within the next 14 days.

16                   Thank you.

17                   MS. MOSES: Thank you, Your Honor.

18                   (Matter concluded)

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